

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
CoxCom, Inc. d/b/a Cox Communications Phoenix)	CSR-5897-E
)	
Petition for Determination of Effective)	
Competition in Phoenix, AZ, <i>et al.</i>)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 12, 2002

Released: September 18, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. CoxCom, Inc. d/b/a Cox Communications Phoenix (“Cox”) has filed with the Commission a petition (the “Petition”) pursuant to Sections 76.7 and 76.907 of the Commission's rules seeking a finding of effective competition in eight communities in Arizona (collectively, the “Communities”).¹ Cox alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended (“Communications Act”),² and the Commission's implementing rules,³ and is therefore exempt from cable rate regulation. Cox claims the presence of effective competition in the Communities stems from the competing services provided by Qwest Broadband Services, Inc. (“Qwest”), a franchised cable operator that also provides local exchange carrier (“LEC”) service in the Communities. Qwest and certain of the Communities filed comments in response to the Petition.⁴ Cox replied to Qwest's comments.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be

¹ The Communities and corresponding community unit identifiers are: Chandler (AZ0105), Gilbert (AZ0203), Glendale (AZ0147), Paradise Valley (AZ0001), Peoria (AZ0110), Phoenix (AZ0053, AZ0109, AZ0273), Scottsdale (AZ0138) and unincorporated Maricopa County (AZ0049, A0131, AZ0183, AZ0191, AZ0246, AZ0322).

² 47 U.S.C. § 543(a)(2).

³ 47 C.F.R. § 76.905(b)(4).

⁴ See Comments of Qwest Broadband Services, Inc. (“Qwest Comments”); Motion to Accept Late Filed Comments (“LFA Motion”) and Comments of the Local Franchising Authorities of Metropolitan Phoenix and Unincorporated Areas of Maricopa County, Arizona (“LFA Comments”). In the LFA Motion, the Communities indicate that Cox had informed them that Cox would not object to the inclusion of the LFA Comments in the record to this proceeding since Cox had initially notified the Communities of an incorrect filing deadline for their comments. LFA Motion at 1. We hereby grant the LFA Motion for leave to file comments outside the normal pleading cycle.

subject to effective competition,⁵ as that term is defined by Section 76.905 of the Commission's rules.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁷ Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁸

3. The Commission has stated that an incumbent cable operator could satisfy the "LEC" effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator's service in the franchise area.⁹ The incumbent also must show that the LEC intends to buildout its cable system within a reasonable period of time if it has not already done so, that no regulatory, technical or other impediments to household service exist, that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased, that the LEC has actually begun to provide services, the extent of such services, the ease with which service may be expanded and the expected date for completion of construction in the franchise area.¹⁰

II. DISCUSSION

4. Cox operates a cable television system in the Communities for which it seeks a determination of effective competition. Cox has provided information demonstrating that Qwest is a telephone company that provides local exchange and other telephone services within the Communities.¹¹ Therefore, Qwest qualifies as a LEC for purposes of the LEC effective competition test.¹²

5. In addition to qualifying as a LEC, Qwest was awarded franchises for the provision of cable service within each of the Communities.¹³ Cox demonstrates that there are no regulatory, technical or other impediments to Qwest's provision of cable service within the Communities.¹⁴ As to whether Qwest provides cable service that substantially overlaps that of Cox, each Qwest franchise contains a requirement to provide cable service to the entirety of each Community within sixty months of the franchise's

⁵ 47 C.F.R. § 76.906.

⁶ 47 C.F.R. § 76.905.

⁷ See 47 C.F.R. §§ 76.906 and 907.

⁸ 47 U.S.C. § 543(1)(1)(D); see also 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 632(l) is referred to as the "LEC" effective competition test.

⁹ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

¹⁰ *Id.*

¹¹ Petition at 4-5.

¹² See 47 U.S.C. § 543(1)(1)(D); 47 U.S.C § 153(a)(1).

¹³ Petition at 3-4 and Exhibits 1A-1H.

¹⁴ *Id.* at 6-11.

effective date.¹⁵ Qwest asserts that, despite the buildout requirement in its franchises, market conditions have made it unclear whether it will be able to complete its system construction in the near future.¹⁶ The Commission cannot reinterpret the future coverage and construction obligations of competitors in light of current events.¹⁷ An incumbent cable operator may establish that a LEC competitor “offers” service by “includ[ing] ... evidence concerning its competitor’s future coverage and construction obligations.”¹⁸ Qwest’s affirmation that it “has no intention of failing to meet its legal obligations to build out its system,”¹⁹ along with its 425,000 homes passed and nearly 42,000 subscribers, further evinces its offering of service to the Communities.²⁰ While Qwest contends that its low subscriber penetration precludes a finding that its cable service substantially overlaps that of Cox,²¹ we specifically rejected this interpretation in the *Cable Reform Order* by declining to adopt penetration standards as part of the LEC test.²² We find that Cox has demonstrated that Qwest’s operations in seven of the eight Communities substantially overlap those of Cox.²³ Based upon the evidence provided, however, we are unable to determine the extent of Qwest’s presence in unincorporated Maricopa County as it relates to Cox’s system and cannot find that substantial overlap exists within this franchise area.²⁴

6. Qwest has distributed marketing materials within the Communities pointing out that residents need only call Qwest for installation of its cable services.²⁵ These marketing materials and Qwest’s website demonstrate that its cable service offers 100 channels of video programming that includes

¹⁵ *Id.* at 7-8 and Exhibits 1A-1H. The effective dates of the franchises range from late 1998 to mid-1999. *Id.* at 7. Each franchise also contains insurance, surety, indemnification and penalty provisions designed to ensure timely performance of Qwest’s buildout commitments. *See id.* at 8 n22-24 and Exhibits 1A-1H.

¹⁶ Qwest Opposition at 9.

¹⁷ *See Cablevision of Boston, Inc.*, 17 FCC Rcd 4772, 4777-79 (2002).

¹⁸ *Id.* at 4779.

¹⁹ Qwest Opposition at n2 (emphasis omitted).

²⁰ Petition at 9.

²¹ Qwest Opposition at 8-9.

²² *Cable Reform Order*, 14 FCC Rcd at 5303.

²³ In addition to Qwest’s franchise buildout obligations, Cox submits information regarding the number of homes currently passed by Qwest in each of the Communities. *See* Petition at Exhibit 2. When compared against the 2000 Census number of households in each Community, Qwest has achieved the following home passage rates: Chandler, 67.3% (41,965 homes passed ÷ 62,377 households = 0.673); Gilbert, 83.6% (29,610 homes passed ÷ 35,405 households = 0.836); Glendale, 48.2% (36,521 homes passed ÷ 75,700 households = 0.482); Paradise Valley, 22.7% (1,145 homes passed ÷ 5,034 households = 0.227); Peoria, 41.3% (16,175 homes passed ÷ 39,184 households = 0.413); Phoenix, 47.6% (221,681 homes passed ÷ 465,834 households = 0.476); and Scottsdale, 60.3% (54,708 homes passed ÷ 90,669 households = 0.603). *See* Profiles of General Demographic Characteristics, Arizona (located at <http://www2.census.gov/census_2000/datasets/demographic_profile/Arizona/2kh04.pdf>).

²⁴ While Cox submits data identifying 204 homes passed by Qwest in unincorporated Maricopa County, no information is provided or is otherwise available regarding the number of households within the specific portions of unincorporated Maricopa County which comprise Qwest’s franchise area. *See* Petition at Exhibits 1H, 2. As such, we are unable to determine whether Qwest’s current presence in unincorporated Maricopa County, when combined with its franchise buildout requirement, satisfy the substantial overlap component of the LEC effective competition test.

²⁵ *Id.* at 10-11 and Exhibits 4, 6 (consisting of direct marketing materials, newspaper advertisements, and web site materials (*see* <<http://www.Qwest.com/vdsl/Phoenix>>)).

non-broadcast programming services such as ESPN, HBO CNN, as well as a complement of local television broadcast stations, such as KPNX-TV (NBC), KNXV-TV (ABC), and KPHO-TV (CBS).²⁶ Therefore, Qwest provides comparable programming as required by the LEC effective competition test.

7. Cox has demonstrated that Qwest has commenced providing cable service within the Communities, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.²⁷ Based on the foregoing, we conclude that Cox has submitted sufficient evidence demonstrating that its cable system serving the Communities, with the exception of unincorporated Maricopa County, is subject to effective competition.

8. Qwest expresses concern that a finding of effective competition might lead Cox to adopt “unlawful predatory pricing” and marketing tactics.²⁸ Qwest asks that the Commission condition any grant of Cox’s Petition upon the continued existence of effective competition in the Communities.²⁹ Certain of the Communities also ask that the Commission use forbearance in deciding whether competition is sufficiently ripe within the Communities such that it reaches the level of effective competition.³⁰ Where an incumbent cable operator has established effective competition, “we cannot deny [their] petition based on future circumstances” and Congress has given us no authority to forbear.³¹ In the event that circumstances in the Communities change, the Communities may file recertification petitions with the Commission to reestablish rate regulation authority over the franchise areas at issue here.³²

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition filed by Cox for a determination of effective competition in Chandler, Gilbert, Glendale, Paradise Valley, Peoria, Phoenix and Scottsdale, Arizona **IS GRANTED**.

10. **IT IS ALSO ORDERED** that the petition for a determination of effective competition in unincorporated Maricopa County, Arizona **IS DENIED**.

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.³³

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

²⁶ *Id.* at 5 and Exhibit 5.

²⁷ *Id.* at 6-11 and Exhibits 4, 6. *See Cable Reform Order*, 14 FCC Rcd at 5305.

²⁸ Qwest Opposition at 4, 10-13.

²⁹ *Id.* at 13-16.

³⁰ LFA Comments at 2.

³¹ *See Cablevision Systems of Connecticut, L.P.*, 14 FCC Rcd 15883, 15890 (1999).

³² *Id.* at 15890-91.

³³ 47 C.F.R. § 0.283.